KREDIT TANJAYA SDN. BHD.

v.

KANAGARATNAM VELLIAN

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[ORIGINATING MOTION NO. 32-19-88]
13 OCTOBER 1989

LAND LAW: *Application to remove private caveat - Landowner signed transfer and handed title to joint-venture partner for development - Developer charged the land - Caveat by landowner entered into after charge document signed - Monies under charge already disbursed - Competing equities - Whether the respondent had prejudiced his own claims.*

The respondent was the owner of 3/5 of a piece of land. He entered into a joint venture agreement with one TKE Co. to develop the land at TKE Co.'s cost where the respondent was to be entitled to some of the units to be constructed on the land gratis. The respondent had agreed to the title of the land being delivered to TKE Co. and had signed a memorandum of transfer of the land.

TKE Co. then approached the applicant for a loan and as security executed a charge over the land - having used the earlier memorandum of transfer to transfer the land into TKE Co.'s name.

The applicant made a search on the land at the time of execution of the charge and found the same to be free from encumbrances - the applicant then disbursed the loan sum to TKE Co. and at the time of presentation of the charge discovered that the same could not be presented for registration as the respondent had in the meantime lodged a private caveat. The applicant applied to the Court to have this caveat removed.

Held:

[1] The situation here is alike the situation of competing equities.

[2] The general principle is that priority will be granted to one who has priority in time of creation of interest unless he has done anything which will make it inequitable for him to retain his priority, such as an act or default which prejudice his own claim - such act or default may be negligence or omission.

[3] Applying the facts in *Abigail v. Lapin* and the principle above, the respondent had signed a transfer and given it with the title to TKE Co. thus enabling TKE Co. to represent itself as the owner of the land - this is an act by the respondent which prejudices the respondent's case.

[4] Further the respondent failed to lodge a caveat until after the equitable interest of the applicant had been created - the caveat lodged in subsequently would be of no avail against such prior interest.

[Application to remove caveat allowed with costs.]

Cases referred to:

Butler v. Fairclough [1917] 23 CLR 78
Abigail v. Lapin [1934] AC 491
Vallipuram Sivaguru v. Palaniappa Chettey [1937] Rep 55
Pok Kew Chai v. Yeoh Thian Seng [1975] 1 MLJ 220
United Malayan Banking Corpn. Bhd. v. Goh Tuan Laye & Anor. [1976] 1 MLJ 169

For the plaintiff - Ng Seng Lee; M/s. Yeoh Kian Teik & Co.
For the defendant - Mat Diah bin Endut; M/s. Thevin Chandran Siva Wong & Jamal

JUDGMENT

Peh Swee Chin J:

The plaintiff, (hereafter called the chargee), in this motion sought to remove a caveat lodged by the defendant (hereafter called the caveator), the registered owner at all material times of 3/5 undivided interest in the land in question, (hereafter called the said land).

The caveator entered into a 'joint venture' agreement with one Teng Kong Enterprise Sdn. Bhd. (hereafter called TKE Co.) on 16 February 1983 for houses to be built on the said land at the entire expenses of the TKE Co., and in consideration therefore, the caveator was to take some of them *gratis*. On 5 June 1986, the same parties made a supplementary agreement for, *inter alia*, extending the time of completion of buildings for a further 3 years and for the caveator to part with the document of title to the said land to the TKE Co. with apparently a memorandum of transfer duly signed by the caveator, "to carry into effect terms and conditions of the said 'joint venture' agreement.

In the meantime, TKE Co. lost no time apparently in approaching a licensed money-lender, i.e., the chargee for a loan of RM140,000 on the security of a charge to be executed by TKE Co. in favour of the chargee. The loan was granted and paid on quite impressive credentials, i.e., the document of title of the said land and the duly signed memorandum of transfer given earlier by the caveator to the TKE Co. The chargee made a search earlier before the execution of the charge (and the money-lender's memorandum of agreement) and did not then find the present caveat complained of, but as they were going present the transfer and charge documents for registration, they found the caveat, the caveat having been lodged; after the execution of the charge, and the payment of the said RM140,000 hence the present notice of motion for its removal.

The facts of the case in so far as they were not in dispute very clearly gave rise to a situation similar to that of competing equities both claiming for priority from the Court.

From reported cases, it seems reasonably well-settled and also by conclusion from them, that the general rule in such a case is that priority will be granted to one who has priority in time of creation of interest, i.e., *qui prior est tempore, potior est jure* unless he has done anything which will make it equitable for him to retain his priority, such an act or default, which prejudices his own claim. Such act or default may be negligence or omission. Please see *Butler v. Fairclough* [1917] 23 CLR 78; *Abigail v. Lapin* [1934] AC 491; *Vallipuram Sivaguru v. Palaniappa Chettey* [1937] Rep. 55; *Pok Kew Chai v. Yeoh Thian Seng* [1975] 1 MLJ 220; *United Malayan Banking Corpn. Bhd. v. Goh Tuan Laye & Anor.* [1976] 1 MLJ 169; (the last mentioned case being one of claiming adversely against each other by unregistered lien holder and purchaser).

Any reference in text books or reported judgments to a party having a better equity or about the equities being equal, should be understood to mean whether anyone has or has not been guilty of any act or default such as negligence or omission which prejudices his own claim, so that e.g., if he has not, while the other party has, he has better equity and *vice versa*, and so on.

The facts of the instant case were strikingly similar to those of the Privy Council case of *Abigail v. Lapin*, on which many a Malaysian case was based. In that case, Lapin signed a transfer of the land in question in favour of one Heavener and gave the document of title in

question to her too, merely as security for a debt. Heavener however registered the land in her own name and then mortgaged it to Abigail, who lodged a caveat, but before Abigail could register the mortgage, Lapin at this juncture woke up and lodged a caveat, which was not lodged earlier. In the Privy Council, Lord Wright, in holding for Abigail, said, *inter alia*, at p. 504,: "Apart from priority in time, the test for ascertaining which incumbrancer has the better equity must be whether either he has been guilty of some act or default which prejudices his claim." It was held, that Lapin had enabled Heavener to represent herself as legal owner and to deal with the land as such, and it was an act which prejudiced Lapin's own claim or title, while Abigail had not been guilty of such act or conduct.

Applying what has been stated above, to the instant case, the caveator had signed a transfer and given it with the document of title to the TKE Co. and thus enabled the latter to represent itself as owner to deal with the said land, and like the said Lapin, the caveator had also failed to lodge a caveat earlier to give notice to the world of his claim as alleged in the caveat until it was too late, when another interest had been created and the caveat lodged thereafter would be of no avail to such prior interest created.

I therefore granted the order in terms of the motion in favour of the plaintiff (the chargee) with costs.

Also found at [1990] 1 CLJ 298